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In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM H. BURTON, APPELLANT

v.

THE WILMINGTON PARKING AUTHORITY, A BODY CORPORATE AND POLITIC OF THE STATE OF DELAWARE, AND EAGLE COFFEE SHOPPE, INC., A CORPORATION OF THE STATE OF DELAWARE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This case, we believe, presents issues of broad importance.[1] One need not elaborate upon the truism that there is growing participation by governmental agencies—national, state and local—in a host of activities designed to promote the public welfare. By the same token, it is a matter of great moment that public funds and property be utilized for the benefit of all citizens, without distinctions based on race, color, creed or other impermissible classification. The Constitution of the United States requires no less.

[1] The background facts are fully stated in appellant's brief, and we shall not attempt to restate them.

It is not amiss to point out that the United States is the single greatest landholder in the Nation. Under the Constitution, it may not discriminate. The Federal Government accordingly has the duty to insure that properties and facilities which it leases (for example, leases to concessionaires in the national parks) shall be accessible to the general public on a non-discriminatory basis. Corresponding duties rest upon the several states.

1. The Fourteenth Amendment applies to "State action of every kind, which * * * denies * * * the equal protection of the laws," *Civil Rights Cases*, 109 U.S. 3, 11. And there is state action, in the sense of the Fourteenth Amendment, when there is "state participation through any arrangement, management, funds or property," *Cooper* v. *Aaron*, 358 U.S. 1, 4. And see *Shelley* v. *Kraemer*, 334 U.S. 1, 20 ("State action * * * refers to exertions of state power in all forms").

In the instant case, the racial discrimination is by a restaurant located on public land (land purchased with public funds) operating within a public building constructed with public monies. The lease, moreover, makes an indispensable contribution to the support of activities in which the Authority engages elsewhere in the building. No more is required, we submit, to establish that access to the restaurant facility must be accorded without racial discrimination.

Indeed, we think it plain that the prohibitions of the Fourteenth Amendment have been held binding in situations where state participation might be deemed less direct and substantial than it is here.

In the *Girard* case, *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230, the discrimination (in that case, against Negro applicants for admission to Girard College) stemmed from the fact that an individual had placed limitations upon the use of monies which he had placed in a private trust. A state agency was involved in the matter as trustee, *i.e.*, it was engaged in carrying out the trust in accordance with its terms. This Court nonetheless concluded that the action of the trustee was "discrimination by the State" (353 U.S. at 231). The case thus illustrates the general principle that it is immaterial that the racial discrimination being enforced by a state agency has its origin in purely private action (*i.e.*, that the racial exclusion or discrimination was made in the first instance by an individual or private organization). What is material and decisive, for purposes of the Fourteenth Amendment, is that the state has chosen to place its power behind the discrimination. This it may not do, in any form or through any device. If a state cannot participate in the administration of a private trust which draws racial distinctions, as the *Girard* case holds, it follows, we believe, that it cannot lease its own property for a use which will involve denial of access on the basis of race. This is particularly so where, as in this case, the leased property is integrally related, both physically and by financial ties, to the conduct of other activities in which the public authority is engaged. See *infra*, pp. 8–10.

This Court has also placed sharp limitations upon the use of judicial process to enforce private acts of

discrimination. In *Shelley* v. *Kraemer*, *supra*, judicial enforcement of private racial restrictive covenants by means of injunctions, where the result was to create a condition which could not be established through state legislative action (*Buchanan* v. *Warley*, 245 U.S. 60), was held violative of the Fourteenth Amendment. In *Barrows* v. *Jackson*, 346 U.S. 249, the rule was extended to cover the assessment of damages for breach of such covenants. In *Marsh* v. *Alabama*, 326 U.S. 501, this Court ruled that state courts could not adjudge convictions for trespass against persons exercising their rights of free speech in a privately owned company town. In that context, the "private" action was deemed to be sufficiently infused with governmental aspects to be properly attributable to the state. The leasing of state property—particularly where the leased property remains an integral part of a public facility—certainly presents at least as many indicia of state action as were found in the cited cases.

2. There is also a large body of case law which deals with the precise type of problem presented here, *i.e.*, discrimination by a lessee of public property or facilities. See *Muir* v. *Louisville Park Theatrical Association*, 347 U.S. 971, vacating and remanding, 202 F. 2d 275 (C.A. 6) (leased open air theater); *Aaron* v. *Cooper*, 261 F. 2d 97 (C.A. 8) (leased school); *City of Greensboro* v. *Simkins*, 246 F. 2d 425 (C.A. 4), affirming 149 F. Supp. 562 (M.D.N.C.) (leased golf course); *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5), certiorari denied, 353 U.S. 924 (leased cafeteria); *Coke* v. *City of Atlanta*, 184 F. Supp. 579 (N.D. Ga.) (leased airport restaurant); *Jones* v.

Marva Theatres, 180 F. Supp. 49 (D. Md.) (leased motion picture theatre); *Tate* v. *Department of Conservation*, 133 F. Supp. 53 (E.D. Va.), affirmed, 231 F. 2d 615 (C.A. 4), certiorari denied, 352 U.S. 838 (leased beach); *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E.D. Va.) (leased airport restaurant); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.) (leased swimming pool).[2] Although these decisions are rested on various grounds—in some, that the lease was a technique of evading state responsibility; in others, that the property, though privately operated, was being used for a public purpose—they have been uniform in reaching the conclusion that the discrimination effectuated by the lessee was constitutionally forbidden.

Derrington v. *Plummer*, *supra*, is a case which, on its facts, is close to the one at bar. There, a restaurant was constructed in the basement of a new courthouse building. After completion, the space was leased to a private party for operation. Following a refusal of service, several Negroes brought suit to enjoin the County from leasing to any tenant who practiced such discrimination. Sustaining an injunction issued by the District Court, the Fifth Circuit held that the action of the lessee was not mere private

[2] See, also, *City of St. Petersburg* v. *Alsup*, 238 F. 2d 830 (C.A. 5), certiorari denied, 353 U.S. 922, holding that it is irrelevant, for purposes of the Fourteenth Amendment, whether the state's activity is "governmental" or "proprietary."

conduct, but partook of state action. The opinion stated (240 F. 2d at 925–926):

> Assuming no purpose of discrimination on the part of the County in the renewal of the lease, and further assuming no express reservation of control by the terms of the lease to prevent discrimination, * * * the basement of the courthouse can by no means be termed surplus property not used nor needed for County purposes. To the contrary, the courthouse had just been completed, built with public funds for the use of the citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. Without more justification than is shown in this case, no court could countenance the diversion of such property to a purely private use.
>
> * * * If the County had rendered such a service directly, it could not be argued that discrimination on account of race would not be violative of the Fourteenth Amendment. The same result inevitably follows when the service is rendered through the instrumentality of a lessee; and in rendering such service the lessee stands in the place of the County. His conduct is as much state action as would be the conduct of the County itself. * * *

Similarly, in *Nash* v. *Air Terminal Services, Inc., supra,* the plaintiff was refused service in a privately run concession at the Washington National Airport. The court found (85 F. Supp. at 549) that the plaintiff had been denied his rights under the Fourteenth Amendment since the restaurant was operated "too

close, in origin and purpose, to the functions of the public government to allow them the right to refuse service without good cause." And in *Coke* v. *City of Atlanta, Georgia, supra,* the court appears to have discarded the exception suggested in the *Derrington* opinion, *i.e.,* that property not used or needed for governmental purposes may be operated free of the restrictions of the Fourteenth Amendment. Although it found that property at the Atlanta Airport Terminal leased as a restaurant was not used or needed for city purposes, the court held (184 F. Supp. at 585):

> Under the facts in this case the Court holds that the conduct of Dobbs Houses, Inc. [the lessee] is as much state action as would be similar conduct of the City of Atlanta itself and that the discrimination practiced by Dobbs Houses, Inc. in refusing to serve Negroes except upon a segregated basis is violative of plaintiff's rights as a Negro citizen under the equal protection provision of the Fourteenth Amendment. * * *

While the cases involving leases of government property deal with variant factual situations, they have one element in common: all of them involved facilities which, although operated by non-governmental lessees, were open to the public generally. Under such circumstances at least, where one segment of the general public is singled out and refused service solely because of race or color, "* * * the right of citizens to use public property without discrimination on the ground of race may not be abridged by the mere leasing of the property." *City of Greensboro* v. *Simkins,* 246 F. 2d 425, 426 (C.A. 4).

3. The grounds of distinction offered by the opinion below are not, in our view, tenable. These grounds are (a) that the use of public funds to create and operate the Authority was so slight as not to change the private nature of the enterprise (R. 53), and (b) "that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility" (R. 52).

A. We believe it unnecessary under the Constitution for a court to determine the precise extent to which the Wilmington Parking Authority is underwritten by public money, for there is no question that the Authority is an agent of the State. The statute creating the Authority specifically provides so. 22 Del. C. 504(a).

Even if the amount of public contribution were a material factor, the court below acknowledged that 15 per cent of the costs of constructing the Authority's facility consisted of public monies[3] (R. 50, 53). Such a contribution is not *de minimis*. Moreover, the court below has ignored the fact, manifest in the record, that the City of Wilmington gave the Authority $1,822,827.69 of public funds and that this sum was used to redeem the Authority's revenue bonds and to repay its bank loan.[4] In addition, it would seem that the funds received by the sale of

[3] The court's calculation was based only upon the $934,000 "advanced" by the City of Wilmington (R. 50).

[4] The affidavit of Jay C. Pownall, chairman of the Wilmington Parking Authority, submitted to the Court of Chancery and included in the record before the Delaware Supreme Court, attests to the $1,822,827.69 donation by the City of Wilmington.

revenue bonds were as much public funds as the monies donated by the City of Wilmington. The bonds were sold by an agency of the state and were deposited in the treasury of an agency of the state.[5]

B. The court below also gave great weight to its determination that a restaurant within a parking facility is not designed "for the convenience and service of the public using the parking service." It is not necessary, however, to say that those members of the public who utilize the parking facilities have need of the restaurant's services in order to conclude that the operation of the restaurant is integrally related to the public activity which is the primary concern of the Authority.[6] It is undisputed that it would not

[5] See *Tate* v. *Department of Conservation and Development*, 133 F. Supp. 53 (E.D. Va.), affirmed, 231 F. 2d 615 (C.A. 4), certiorari denied, 352 U.S. 838, and *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.) where the facilities involved were constructed by state agencies with funds derived almost entirely from the sale of public bonds.

[6] The public importance of the Authority's activities cannot be doubted. The Parking Authority Act of 1951 (22 Del. C., Ch. 5)—under which the Wilmington Parking Authority was created—contains a detailed statement of findings and policy (Sec. 501). This statement emphasizes the urgency of traffic control and stresses the need to provide adequate parking facilities. It states:

"The establishment of a parking authority will promote the public safety, convenience, and welfare * * * therefore it is declared to be the policy of this State to promote the safety and welfare of the inhabitants thereof by the creation in incorporated cities of bodies corporate and politic to be known as "Parking Authorities * * *."

The 1951 Act also gives the Authority the power to lease where "such leasing is necessary and feasible for the financing and operation of such facilities" (Sec. 504(a)). And see *Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 439, 105 A. 2d 614, holding that the furnishing of off-street parking is a proper public purpose which meets an existing need.

be possible for the Authority to carry out its authorized public purpose—providing off-street parking facilities—in the absence of revenues from Eagle and other lessees in the building. The opinion below stated (R. 51) that commercial leasing was "necessary financially to the project." And, since the leasing activity is vital to the functioning of the Authority, it cannot be heard to assert that it is free to conduct that activity without complying with the constitutional standards applicable to all forms of state action.

In *Boynton* v. *Virginia*, No. 7, this Term, decided December 5, 1960, the Court was also dealing with a restaurant, one which was located in a bus terminal. The Interstate Commerce Act, Part II, regulates carriers only. Moreover, carriers are not required to provide restaurants in their terminals. But the facts of the *Boynton* case disclosed a close interrelationship between the carrier's service and the restaurant. The Court concluded that:

> * * * where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers * * * an interstate passenger need not inquire into documents of title or contractual arrangements in order to determine whether he has a right to be served without discrimination.

The rationale of the *Boynton* case, although that decision involved only a statutory problem, is pertinent here. The facts here demonstrate that the Authority's commercial leases form an "integral part" of its activity. In these circumstances, the State and

its lessee are similarly foreclosed from pursuing a racially discriminatory arrangement. A patron entering the public building owned by the Authority and bearing its name has the right, without inquiring into the documents between landlord and tenant, "to be served without discrimination."

CONCLUSION

The judgment of the Supreme Court of Delaware should be reversed.

Respectfully submitted.

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